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No. 86-91

In The

Supreme Court of the United States

October Term, 1986

JACK JERSAWITZ,

Petitioner,

v.

THE WARDEN OF ATLANTA PENITENTIARY, WILLIAM NOONAN, AND THE UNITED STATES BUREAU OF PRISONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES

Page

CASES:

City of Los Angeles v. Preferred Communications, Inc., 54 U.S.L.W. 4542 (June 2, 1986) 2

Capital Cities Media, Inc. v. Chester, No. 85-5132 (3d Cir., July 21, 1986) (*en banc*) 1, 2, 4, 6

Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977) 2, 4, 6

Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971) 2

Borreca v. Fasi, 369 F. Supp. 906 (D.C. Hawaii 1974) 2

Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n., 365 F. Supp. 18 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976) 2

Houchins v. KQED, Inc., 438 U.S. 1 (1978) 5

Lewis v. Baxley, 368 F. Supp. 768 (M.D. Tenn. 1965) 2

Kovach v. Maddux, 238 F. Supp. 835 (M.D. Tenn. 1965) 2

Cable News Network, Inc. v. ABC, 518 F. Supp. 1238 (N.D. Ga. 1981) 2

Westinghouse Broadcasting v. National Transportation Safety Board, 8 Media L. Rptr. 1177 (D.C. Mass. 1982) 2

United States v. Diebold, Inc., 369 U.S. 654 (1962) 4

CONSTITUTION:

First Amendment, U.S. Const. 2, 3, 5, 6

Fourteenth Amendment, U.S. Const. 5

TEXT:

1 Annals of Congress 432-42 (J. Gales ed. 1789), *reprinted in* 5 *The Writings of James Madison* 370-89 (G. Hunt ed. 1904) 5

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Five days after Petitioner filed for certiorari in this Court, the Third Circuit Court of Appeals, sitting en banc, issued its opinion in *Capital Cities Media, Inc. v. Chester.*[1] The Third Circuit's decision in *Capital Cities Media* conflicts in principle with the Eleventh Circuit's decision here. This recent development and the Respondent's contention that certiorari should be denied because Mr. Jersawitz "is not a bona fide journalist"[2] deserve careful examination.

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1 No. 85-5132 (3d Cir., July 21, 1986) (en banc).

2 Memorandum for the Respondents in Opposition at 5, n. 2.

1. The Third Circuit's Decision in Capital Cities Media Conflicts In Principle With The Eleventh Circuit's Treatment of Mr. Jersawitz' Equal Protection Claim.

Despite the glaring conflict in principle between this case and the decisions of this Court,[3] the Third Circuit,[4] the District of Columbia Circuit,[5] and various district courts,[6] the Respondents oppose review by certiorari. The equal protection analysis applied by the Eleventh Circuit in this case squarely conflicts with the recent decision of the Third Circuit in *Capital Cities Media.*

In *Capital Cities Media,* a Pennsylvania newspaper sued for access to information in the hands of the Pennsylvania Department of Environmental Resources ("D.E.R."). Like Mr. Jersawitz, the newspaper advanced two claims: (1) a First Amendment right-of-access claim; and

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[3] *City of Los Angeles v. Preferred Communications, Inc.,* 54 U.S.L.W. 4542 (June 2, 1986).

[4] *Capital Cities Media, Inc. v. Chester,* No. 85-5132 (3d Cir., July 21, 1986) (*en banc*).

[5] *Sherrill v. Knight,* 569 F.2d 124 (D.C. Cir. 1977).

[6] *Quad-City Community News Service, Inc. v. Jebens,* 334 F. Supp. 8, 14-16 (S.D. Iowa 1971). *See also Borreca v. Fasi,* 369 F. Supp. 906 (D.C. Hawaii 1974); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n.,* 365 F. Supp. 18 (D.D.C. 1973), *rev'd on other grounds,* 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976); *Lewis v. Baxley,* 368 F. Supp. 768 (M.D. Tenn. 1965); *Kovach v. Maddux,* 238 F. Supp. 835 (M.D. Tenn. 1965); *Cable News Network, Inc. v. ABC,* 518 F. Supp. 1238 (N.D. Ga. 1981); *Westinghouse Broadcasting v. National Transportation Safety Board,* 8 Media L. Rptr. 1177 (D.C. Mass. 1982).

(2) an equal protection claim. The district court dismissed both claims.

The Third Circuit agreed that the First Amendment conferred no right of access to the sought-after information. Noting this Court's holdings in *Pell* and *Saxbe,* the Third Circuit ruled that the newspaper had no greater right of access to the information than did the public generally.[7]

However, the Third Circuit vacated the dismissal of the newspaper's equal protection claim. The Third Circuit held:

> *We believe the allegations,* accepted by the district court as setting forth the equal protection claim, *may be read to claim that the D.E.R. has been discriminating between news-seekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly.* Moreover, at oral argument before us, the Times leader represented that there was reason to believe that there had been D.E.R. discrimination between newsgatherers since the district court's decision. *Given the seriousness of this claim and the public interest in having it resolved on its merits, we conclude that the judgment should be vacated and the case remanded to the district court.*[8]

Like the plaintiff in *Capital Cities Media,* Mr. Jersawitz has challenged governmental discrimination among newsgatherers. The Respondents admit that they discriminated against Mr. Jersawitz solely on the basis of his employment status.[9] Without the slightest inquiry into

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7 Slip Op. at 20.

8 Slip Op. at 28 (emphasis added).

9 R. 127.

whether he presented a security risk,[10] the Respondents denied him access to interview a critic of U. S. foreign policy.[11] These uncontroverted facts support the inference[12] that the government is "discriminating between newsseekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly."

Under the Third Circuit's analysis in *Capital Cities Media*, "the seriousness of this claim and the public interest in having it resolved on the merits" warrant the application of stringent equal protection analysis. Yet, the Eleventh Circuit cavalierly affirmed summary judgment against Mr. Jersawitz' equal protection claim on the theory that it lacked "constitutional magnitude."[13]

2. Mr. Jersawitz' Journalistic Endeavors Deserve Equal Protection.

The Respondents strain to justify this extraordinary treatment of a valid equal protection claim by arguing that —in contrast to freelancer Robert Sherrill (the plaintiff who challenged his exclusion from White House press facilities in *Sherrill v. Knight*)—Mr. Jersawitz is not "a bona fide journalist."[14] The Respondents' argument sug-

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10 R. 127-128.

11 R. 8-9.

12 Despite this inference, the district court disposed of Mr. Jersawitz' claim on a motion for summary judgment. 610 F. Supp. at 538. This grant of summary judgment was improper because "[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

13 783 F.2d at 1534.

14 Memorandum for the Respondents in Opposition, at 5, n. 2.

gests that this equal protection challenge should be resolved by the rote application of a Latin label.

This Court has repeatedly observed that equal protection guarantees applied in the context of newsgathering protect the *substance* of what journalists do, not the status, class, or profession of journalists.[15] This interpretation is perfectly consistent with James Madison's articulated purpose in drafting the speech-press clause.[16]

The record here shows what Mr. Jersawitz *does:* he produces television public affairs programming for a potential audience of 115,000 television viewers in the city of Atlanta.[17] Some viewers rely on Mr. Jersawitz's programming for information of unique importance to citizens who participate in the process of informed and enlightened self-government.[18] His efforts to gather and to broadcast information regarding the views of a critic of government policy are exactly what the First Amendment was designed to protect.

That Mr. Jersawitz performs his journalistic endeavors without pecuniary motive hardly reflects on his "bona

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[15] The First and Fourteenth Amendments do not guarantee the *public* a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

[16] Madison justified the speech-press clause as a means of restraining the abuse of power by public officials. 1 Annals of Congress 432-42 (J. Gales ed. 1789), *reprinted in* 5 *The Writings of James Madison* 370-89 (G. Hunt ed. 1904).

[17] R. 110.

[18] R. 115-116.

fides" as a journalist. More importantly, the absence of commercial purpose in no way undermines the constitutional protection accorded the flow of information generated by Mr. Jersawitz' efforts. Therefore, one is hard put to reconcile the Eleventh Circuit's conclusion that press access regulations designed to assure "objective or accurate reporting by responsible newsmen" present no claim of "constitutional magnitude" with the Third Circuit's contrary holding in *Capital Cities Media* or the D.C. Circuit's contrary holding in *Sherrill*.

The Respondents urge this Court to rationalize this significant conflict by adopting the government's definition of "bona fide journalist": one who gathers and reports news with commercial intent or pecuniary motive. The First Amendment supports no such distinction. The equal protection clause forbids the government from enforcing such a distinction absent *compelling* justification. In this case, the government has failed to establish even a *rational* justification. Thus, the decision below warrants review.

Respectfully submitted,

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